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May 24, 2019

**VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

Christopher Hazeltine
City Manager
City of Poway
13325 Civic Center Drive
Poway, California 92064

Re: Notice of Violations and Intent to Sue under the Clean Water Act, 33 U.S.C. §
1251 et seq.

Through counsel, Poway landowner [REDACTED] notifies you of his intent to update his citizen lawsuit against the City of Poway with additional claims in an amended complaint and to file supplemental pleadings setting out claims based on facts that occurred after the original pleading was filed on November 15, 2018 over ongoing violations of the Clean Water Act (CWA) and the San Diego Regional MS4 Permit, Order No. R9-2013-0001, as amended by Order Nos. R9-2015-0001 and R9-2015-0100. The City of Poway is the owner and operator of Lake Poway and the Lake Poway Recreation Area which includes the City-owned MS4 which receives discharges of stormwater, non-storm spring waters, rising groundwaters, and unpermitted dredged and fill materials from the City's activities as well from residents of Warren Canyon upstream of Lake Poway under the City of Poway's jurisdiction. The City of Poway is ultimately responsible for all of these discharges into and from its MS4 into receiving waters including into Lake Poway which has been deemed "Waters of the United States" by the EPA and the State of California. Under its MS4 Permit, the City of Poway is also responsible for exceedances of the effluent standards and limitations for phosphorous and the nutrient rich non-storm water that is being discharged into its MS4 and into Lake Poway on a daily basis during the times of the year when there is stream flow through Warren Canyon. In 2019, Warren Creek has had consistent stream flow since February 5, 2019, 24 hours a day, 7 days a week, persisting to the present day. More than 90% of the time, the permitted MS4 contribution of phosphorous into Warren Creek and into Lake Poway (0.1 mg/L maximum daily action level (MDAL)) has been exceeded, oftentimes at levels double the amount allowed by the City's MS4 Permit and the San Diego's Basin Plan.² One of the main sources of

¹ [REDACTED] owns the following parcels in the City of Poway: APNs [REDACTED]. These parcels are all within the subwatershed area feeding Lake Poway. His mailing address is [REDACTED]. He can be reached at [REDACTED] or via email at [REDACTED].

² Similarly, in 2017, phosphorous levels in the discharges from the Fisherman Footbridge, located

soluble phosphorous into the City of Poway's MS4 is from Kelly Spring, located at 32.9998 Latitude, -116.9749 Longitude, which is under the City of Poway's jurisdiction and on [REDACTED] property. Over the last 50 years, including as recently as 2016, the residents of Warren Canyon have altered the wetland system surrounding Kelly Spring, resulting in the loss of its phosphorous-retention capacity. Other wetland systems in Warren Canyon including on the City owned property surrounding Warren Crossing, located at 33.003 Latitude, -117.006 Longitude, have also lost their pollutant-retention capacity as a direct result of anthropogenic activity. The City of Poway's MS4 Permit and Jurisdictional Runoff Management Plan (JRMP) require it to minimize spring water flows containing pollutants³ into its MS4 through rehabilitating damaged streams and re-establishing wetlands⁴ to address and reduce the non-storm water that is a source of pollutants aggravating a condition of pollution in Warren Creek and in Lake Poway. A condition of pollution has been occurring in Warren Creek and in Lake Poway over the last fifty years, which was recently highlighted in 2017 when a massive winter storm resulted in the destruction of approximately ten man-made conveyances (e.g., dirt backfilled culverts) throughout Warren Canyon in the City of Poway, with the unpermitted waste being deposited in downstream portions of Warren Creek including Lake Poway. Neither the residents of Warren Canyon nor the City of Poway obtained the proper CWA permits for the man-made conveyances (point-source stream crossings) built over Warren Creek that were blown out by the massive amount of storm water runoff that occurred in 2017. Some residents of Warren Canyon rebuilt these manmade conveyances after the winter storms of 2017 without the proper CWA permits and water quality certifications from the San Diego Water Board.⁵ Even the City of Poway failed to obtain the proper CWA permits and water quality certifications for its rebuilding activities in Warren Creek and Lake Poway in 2017, including the Warren Crossing project as well as the boat dock replacement project within the navigable portion of its receiving waters. The condition of pollution occurring in Warren Canyon has caused and threatened to cause the loss of water storage capacity of Lake Poway, a drinking water reservoir. The condition of pollution occurring in Lake Poway has also caused and threatened to cause eutrophication in fishable Lake Poway from the nutrient-rich sediment and nutrient-rich non-storm water flows coming through the City's MS4, threatening to accelerate swamp-like conditions in Lake Poway. (See Exhibit 1.) For these reasons and the reasons discussed below, [REDACTED] intends to update his citizen lawsuit⁶ against the City of Poway at the expiration of sixty days from the date of this letter and will seek declaratory and injunctive relief, civil penalties, and all other relief authorized by law for these violations.

at 33.0039 Latitude, -117.0070 Longitude, to Lake Poway exceeded the MDAL more than 90% of the time between January 27, 2017 and April 15, 2017.

³ The 2013 MS4 Permit, C-8, defines "pollutant" as follows: "Any agent that may cause or contribute to the degradation of water quality such that a condition of pollution or contamination is created or aggravated." Caltrans's MS4 permit has a more limited definition of "pollutant."

⁴ According to the San Diego Water Board, re-establishment means the manipulation of the physical, chemical, and/or biological characteristics of a site with the goal of returning natural/historic functions to a former aquatic resource. Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area and functions.

⁵ Obtaining CWA permits is not merely a procedural requirement; properly engineered structures that could withstand a 100-year storm – i.e. something other than a dirt-backfilled culvert system – would have been built throughout Warren Canyon if Warren Canyon residents and the City of Poway obtained valid permits approved by the San Diego Water Board.

⁶ In the alternative, [REDACTED] reserves the right to file a separate lawsuit, through counsel, over any of the claims set forth in this letter.

I. Background

Lake Poway is within the San Dieguito River (SDR) Watershed Management Area (WMA) which encompasses a total of 346 square miles of urban land and open space extending from San Dieguito Lagoon in the west to Volcan Mountains in the east. Small creeks drain downstream into the San Dieguito River, then into the San Dieguito Lagoon, and finally into the Pacific Ocean. In comparison, the subwatershed area that feeds Lake Poway itself, which has been deemed “waters of the United States” (WOTUS) by the Environmental Protection Agency (EPA) and the State of California, is quite small, encompassing only 1200 acres or less than 2 square miles of the entire SDR watershed. The lake is mainly fed by two headwater intermittent streams draining Mount Woodson and Rock Haven, natural mountain springs that feed these intermittent streams, and a series of separate smaller tributaries that drain other portions of the surrounding mountainsides directly into the reservoir. At the Boulder Bay area of Lake Poway, the main fourth-order intermittent stream feeding the reservoir is known as Warren Creek; collectively, all surrounding drainage into Lake Poway, including Warren Creek, is known as Warren Canyon. The City of Poway has at least two National Pollutant Discharge Elimination System (NPDES) permits for discharges into Lake Poway, including the 2013 municipal separate storm sewer systems (MS4) Permit – the 2013 MS4 Permit – for point-source discharges from Warren Creek and Warren Canyon into Lake Poway issued by the San Diego Water Board.⁷ Fulfilling certain requirements of the 2013 MS4 Permit, the City of Poway has an approved Jurisdictional Runoff Management Plan (JRMP) specific to the City of Poway and, along with five other municipalities within the SDR WMA, an approved Water Quality Improvement Plan (WQIP).

II. THE CITY OF POWAY HAS NOT ADDRESSED ILLEGAL DISCHARGES OF DREDGED AND FILL MATERIALS INTO ITS MS4 AND INTO LAKE POWAY.

Poway has discharged and continues to discharge unreasonable amounts of sedimentation pollution waste (and other assimilated pollutants in storm water and non-storm water) from its MS4 in a manner that is causing, or threatening to cause, a condition of pollution – i.e. the loss of municipal storage capacity, harm to recreational activities such as fishing, and harm to aquatic species through eutrophication – in Lake Poway, a receiving water of the state and WOTUS, in violation of its 2013 MS4 Permit, Provision A.1.a. Poway’s discharges (including the discharges of third parties within and under its jurisdiction) that are causing a condition of pollution in Lake Poway are inherently in violation of the waste discharge prohibitions incorporated in the San Diego Water Board’s Basin Plan in violation of Provision A.1.c.

NPDES MS4 Permits are contracts, and they are to be interpreted as contracts. Nat. Res. Def. Council v. County of L.A., 725 F.3d 1194, 1204-05 (9th Cir. 2013). “The plain language of CWA § 505 authorizes citizens to enforce *all* permit conditions” in such contracts. Nw. Envtl. Advocates v. City of Portland, 56 F.3d 979, 986 (9th Cir. 1995) (emphasis in original). The Ninth Circuit has held that Congress authorized enforcement of state water-quality standards in MS4 permits, “lest municipalities be immunized on the technicality that not all water standards can be expressed as effluent limitations.”⁸ Nat. Res. Def. Council v. County of L.A., 673 F.3d 880, 886 (9th Cir. 2011)

⁷ The City of Poway also has a NPDES permit for copper-based algaecides injections used to combat eutrophication within Lake Poway issued by the State Water Board.

⁸ Ninth Circuit case law “emphasizes that NPDES permit enforcement is not scattershot – each

(rev'd on other grounds and remanded by 133 S. Ct. 710 (2013)). "Only by enforcing the water-quality standards themselves" in an MS4 Permit ensures that the "gross amount of pollution discharged" from "uncontrollable storm events" will be addressed by a municipality with improved water quality improvement strategies, even a city that may be in general compliance with technology based effluent limitations as outlined in an approved JRMP.⁹ See Natural Resources, 673 F.3d at 886. And the CWA "does not distinguish between those who add [pollutants] and those who convey what is added by others – the Act is indifferent to the originator of water pollution." *Id.* By virtue of collecting and channeling stormwater and non-storm water through municipality-owned culverts and other conveyances, a city assumes responsibility under the CWA for receiving such pollutants from others through its point sources.¹⁰ See Committee to Save v. East Bay Municipal Util. Dist., 13 F.3d 305 (9th Cir. 1993).

As described by the EPA, water quality criteria "can be . . . narrative (e.g., a criterion that describes the desired conditions of a water body being 'free from' certain negative conditions)" in form. EPA, WQS Handbook, Chapter 3; see 2013 MS4 Permit, F-16. Water quality standards as defined in CWA § 303(c) consists of the beneficial uses (e.g., recreational activities such as fishing, municipal drinking water supply, etc.) of a water body and water quality objectives necessary to protect those uses. Moreover, a condition of pollution exists when the water quality needed to support designated beneficial uses has become unreasonably affected or impaired by waste.¹¹ 2013 MS4 Permit, C-11–C-12; Cal. Water Code § 13050(l). Waste broadly "encompasses any substance whose formation was caused by human activity or whose path through the ecosystem is controlled or affected by human agency." Karl Phaler, Water Quality Control in California, 1 Ecology L.Q. 400, 406 (1971).¹² The San Diego Water Board Basin Plan prohibits the following "waste" discharges: 1) Discharge of pollutants or dredged or fill material to waters of the United States except as authorized by a NPDES permit or a dredged or fill material permit; 2) Discharge of waste to inland surface waters in a manner causing a condition of pollution; 3) Discharge of waste in a manner causing flow, ponding, or surfacing on lands not owned or under the control of the discharger; 4) The dumping, deposition, or discharge of waste directly into waters of the state or adjacent to such waters in any

permit term is simply enforced as written." L.A., 673 F.3d at 886.

⁹ See Sierra Club v. Union Oil, 813 F.2d 1480, 1491 (9th Cir. 1987) ("It is unclear whether the court intended to excuse these violations under the upset defense or under a de minimus theory. In either event, the district court erred. The Clean Water Act and the regulations promulgated under it make no provision for 'rare' violations.")

¹⁰ The City of Poway is ultimately responsible for regulating the activity of its citizens in Warren Canyon; according to the CWA, the implementing permits, and case law, Poway cannot continue to turn a blind eye to the illegal activity occurring there.

¹¹ Under the Dickey Act, 'pollution' means an impairment of the quality of the waters of the State by . . . waste to a degree which does not create an actual hazard to the public health but which does adversely and unreasonably affect such waters for domestic, industrial, agricultural, navigational, recreational or other beneficial use. Dickey Act, Ch. 1549, § 1, [1949] Cal. Stat. 2782, as amended, ch. 603, § 1, [1957] Cal. Stat. 1815. The updated Porter-Cologne Act does not require that an adverse effect be shown. Cal. Water Code § 13241.

¹² Under the Dickey Act, earth eroded from tractor trails and the deposition of fine-grained particles which affect fish and other aquatic life and reservoir capacity constituted waste discharge. Under the Porter-Cologne Act, it was the legislators' intent to include the prior constructions of waste in the new definition of waste. Cal. State Water Resources Control Board, Study Panel Report, App. A, at 23-24 (1969).

manner which may permit its being transported into the waters; 5) Discharge of waste into a natural or excavated site below historic water levels; and 6) Discharge of sand, silt, clay or other earthen materials from any activity, including land grading and construction, in quantities which cause deleterious bottom deposits, turbidity or discoloration in waters of the state or which unreasonably affect or threaten to affect beneficial uses of such waters. 2013 MS4 Permit, A-1-A-2. The reasonableness of a waste discharge is question of fact.¹³

In the City of Poway, anthropogenic sources of pollutants—namely unpermitted discharges of dredged and fill materials placed around culverts by the City and by private third parties in Warren Canyon in the past 50 years to the present – have become mobilized and discharged into the mouth and other portions of Warren Creek and into Lake Poway as an unreasonable amount of waste from and through Poway’s point sources in violation of its 2013 MS4 Permit. The approximate location of the washed-out, unpermitted point sources as a result of the February 2017 winter storms in Warren Canyon are as follows:

- 1) 33.001298, -117.003004 (APN: 278-290-1100);
- 2) 32.998925, -116.998575 (APN: 278-300-5000);
- 3) 32.998802, -116.997127 (APN: 278-300-5900);
- 4) 33.001296, -117.003004 (APN: 278-290-0600);
- 5) 32.999, -116.996 (APN: 278-200-1900);
- 6) 32.999262, -116.993403 and 32.998869, -116.996763 (APN: 278-200-0700);
- 7) 32.998671, -116.981069 (APN: 278-200-0200);
- 8) 32.998204, -116.977989 (APN: 278-210-1500);
- 9) 32.9980, -116.9761 (APN: 278-210-1800);
- 10) 32.9990, -116.9756 (APN: 278-210-1800);
- 11) 32.998103, -116.976631 (APN: 278-210-1600);
- 12) 32.9992, -117.0003 (APN: 278-300-6000); and
- 13) 33.0030, -117.0057 (APN: 278-280-2300).

These unpermitted discharges have caused and are causing a condition of pollution in Lake Poway. The man-made conveyances in Warren Canyon mentioned above were mostly washed out on (or around) February 27, 2017 and again on (or around) February 14, 2019. The pollution is ongoing because the waste remains in the mouth and other portions of the creek and has become further and further discharged into the reservoir with each passing year and each large storm event and because waste – i.e. unauthorized discharges such as unpermitted dredged and fill and earth eroded from tractors – has been subsequently added to Warren Creek by the City and by other Poway residents of Warren Canyon after the winter storms of 2017.¹⁴ Lake Poway is being affected by waste to the extent that the reservoir is regularly losing its storage capacity, even more dramatically as shown after the February 14, 2019 winter storms (see Exhibit 2), and recreational activities such as fishing are being impaired because of deleterious bottom deposits removing fishing spots and causing turbidity, eutrophication, and coloration of the waters from iron, nitrogen, and phosphorous-rich

¹³ The Ninth Circuit has held that the terms of an NPDES permit, where ambiguous on its face, raises issues of fact. Northwest Environmental Advocates v. City of Portland, 56 F.3d 979, 982 (9th Cir. 1995).

¹⁴ The following parcels have unpermitted rebuilt crossings constructed after the winter 2017 storms: APNs: 278-200-0700; 278-200-1900; 278-280-2300; 278-290-1100; 278-300-5900; 278-290-0600; 278-210-1500; 278-300-6000; 278-200-0200; and 278-300-5000.

water and sediment. The effects of these discharges are the overabundance of harmful cyanobacteria and other algal blooms occurring in Lake Poway, the closure of certain portions of Lake Poway including at Hidden Bay due to swamp-like conditions, the use of harmful copper-based algaecides, and the forced reduction of the water levels and the storage capacity of Lake Poway due to the waste blockage and resulting effects.

While Provision B.3.c of the 2013 MS4 Permit provides an option that allows a Copermitttee to utilize the watershed-based water quality improvement plan to be deemed in compliance with the prohibitions and limitations of Provisions A.1.a and A.1.c, Poway has not submitted a WQIP that follows the rigorous requirements of Provision B.3.c with respect to the types of non-bacterial pollutants that are being addressed in this letter and cannot prove that it has been deemed in compliance with Provisions A of the 2013 MS4 Permit with regard to Warren Canyon and Lake Poway. The bottom line is that Poway is not shielded from liability for the portion of the 20,000 tons of sediment that is "waste" that has been built up in the Boulder Bay area of Lake Poway over the years from illegal, unpermitted activity in Warren Canyon. The City must clean it up.

III. SPRING WATER DISCHARGES OF NUTRIENT RICH WATERS INTO THE CITY OF POWAY'S MS4 THAT EXCEED NALs MUST BE ADDRESSED.

Poway's 2013 MS4 Permit requires that the non-storm spring water that flows into its MS4 and from its MS4 to Lake Poway must be properly addressed through the effective enforcement and implementation of various provisions of the City's 2013 MS4 Permit, particularly the discharge prohibitions and receiving water limitations of Provisions A.1.a., A.1.b., A.1.c., and A.2.a, the adaption of monitoring and assessment program and updates to the water quality improvement plan described in Provision B.5., and the illicit discharge detection and elimination requirements of Provision E.2. The City of Poway has identified in the public record that spring water flows in its MS4 and reaches Lake Poway, and Poway's JRMP has identified the following pollutants coming from its MS4 in Warren Canyon: Indicator Bacteria, Color, Manganese, Mercury, Nitrogen, pH, Phosphorous, Viruses, Turbidity, and Nutrients. The non-storm spring water discharges of pollutants into Lake Poway have recurred seasonally because waste from washed-out unpermitted culvert crossings remains in the creek/MS4 and because non-storm spring water assimilates pollutants from various unpermitted (and illicit) point-source culvert crossings in Warren Canyon, leading to the non-storm water discharge of sediment and other pollutants into Lake Poway. Moreover, discharges of non-storm spring water directly from Rock Haven (Rock Haven Spring) and from Mount Woodson (Kelly Spring) into the City of Poway's MS4 and into Lake Poway are also themselves sources of soluble phosphorous, nitrogen, and iron pollutants aggravating a condition of pollution in Lake Poway. Because Warren Canyon and Lake Poway are City-designated Environmentally Sensitive Areas and because these areas are being fed with non-storm water discharges containing pollutants exceeding non-storm water action levels (NALs) on a regular basis during the winter and spring months of non-drought years as shown in the exhibits attached to this letter, the City of Poway must address these flows as a priority concern as required by Provisions B.5 and E.2.d and must use the resources that it most definitely has to reduce these flows as required by Provision E.2.a.(7) as well as the City of Poway's JRMP (BMP #11). The City of Poway, though inadvertently identifying that groundwater containing pollutants comes from Warren Canyon into its MS4, has not minimized the polluted spring water before it flows into its MS4 by undertaking feasible projects such as constructing water-trapping weirs and repairing wetlands damaged by humans upstream of the lake. If Poway chooses not to address the non-storm spring waters that are contributing pollutants to Lake Poway as required by the 2013 MS4 Permit, the City must then

obtain a separate NPDES permit for the discharges.

Under its 2013 MS4 Permit and its terms, the City of Poway is responsible for exceedances of the effluent standards and limitations for phosphorous and the nutrient rich non-storm water that is being discharged into its MS4 and into Lake Poway on a daily basis during the times of the year when there is stream flow through Warren Canyon. In 2019, Warren Creek has had consistent stream flow since February 5, 2019, 24 hours a day, 7 days a week, persisting to the present day. More than 90% of the time, the permitted MS4 contribution of phosphorous into Warren Creek and into Lake Poway (0.1 mg/L maximum daily action level (MDAL)) has been exceeded, oftentimes at levels double the amount allowed by the City's Permit and the San Diego's Basin Plan.¹⁵ One of the main sources of soluble phosphorous into the City of Poway's MS4 is from Kelly Spring, located at 32.9998 Latitude, -116.9749 Longitude, which is under the City of Poway's jurisdiction. Over the last 50 years, including as recently as 2016, the residents of Warren Canyon have altered the wetland system surrounding Kelly Spring, resulting in the loss of its phosphorous-retention capacity. (See Exhibit 3). Other wetland systems in Warren Canyon including on the City owned property surrounding Warren Crossing, located at 33.0030 Latitude, -117.0057 Longitude, have lost their pollutant-retention capacity as well. The City of Poway's MS4 Permit and JRMP require it to minimize spring water flows into its MS4 through rehabilitating damaged streams and re-establishing wetlands to address and reduce the non-storm water that is a source of pollutants aggravating a condition of pollution in Warren Creek and in Lake Poway, both receiving waters of the United States. A condition of pollution has been occurring in Warren Creek and in Lake Poway over the last fifty years, which was recently highlighted in 2017 when a massive winter storm resulted in the destruction of approximately ten man-made conveyances (e.g., dirt backfilled culverts) throughout Warren Canyon in the City of Poway, with the unpermitted waste being deposited in downstream portions of Warren Creek including at Lake Poway. Neither the residents of Warren Canyon nor the City of Poway obtained the proper CWA permits for the man-made conveyances built over Warren Creek that were blown out by the massive amount of storm water runoff that occurred in 2017. Some residents of Warren Canyon rebuilt these manmade conveyances after the winter storms of 2017 without the proper CWA Section 404 permits and water quality certifications or waste discharge requirements from the San Diego Water Board. Even the City of Poway failed to obtain the proper CWA permits and water quality certifications for its rebuilding activities in Warren Creek and Lake Poway in 2017, including its Warren Crossing project located at 33.0030 Latitude, -117.0057 Longitude and its boat dock replacement project located at 33.0069 Latitude, -117.0123 Longitude within the navigable portion of its receiving waters. The condition of pollution occurring in Warren Canyon has caused and threatened to cause the reduction of the storage capacity of Lake Poway, a drinking water reservoir. The condition of pollution occurring in Lake Poway has also caused and threatened to cause eutrophication in fishable Lake Poway from the nutrient-rich sediment and nutrient-rich non-storm water flows coming from the City's MS4, threatening to accelerate swamp-like conditions in Lake Poway. (See Exhibit 1.)

In previous iterations of the MS4 permits for the San Diego region, certain discharges or flows of non-storm water were "simply listed and referred to as categories of non-storm water discharges 'not prohibited' unless identified as a source of pollutants." 2013 MS4 Permit, F-89. However, the federal NPDES regulations "do not specifically state that such discharges are 'not prohibited' or

¹⁵ Similarly, in 2017, phosphorous levels in the discharges from the Fisherman Footbridge located at 33.0039 Latitude, -117.0070 Longitude, to Lake Poway exceeded the MDAL more than 90% of the time between January 27, 2017 and April 15, 2017.

‘exempt’ or in any way authorized.” Id. In the updated 2013 MS4 Permit, all non-storm water discharges must, at a minimum, comply with the discharge prohibitions and receiving water limitations of Provision A.1.a and A.2.a. 2013 MS4 Permit, F-68. For spring water discharges, the non-storm water action levels (NALs) of Provision C.1 are to be used to determine if the spring water is a source of pollutants aggravating a condition of pollution in receiving waters.¹⁶ Exceedances of the NALs would then provide an indication of the relative severity of a pollutant in non-storm water discharges from the MS4 contributing to potential or observed receiving water quality impacts.

In addition to meeting Provisions A.1.a and A.2.a, the City must fulfill Provision A.1.b which requires that non-storm water discharges be effectively prohibited through the implementation of Provision E.2. 2013 MS4 Permit, at 17. Provision E.2.a of the City’s 2013 MS4 Permit requires each Copermittee to address all types of non-storm water discharges into its MS4 as illicit discharges, unless the discharge is authorized by a separate NPDES permit or identified as a category of non-storm water discharges or flows that must be addressed pursuant to the requirements of Provision E.2.a.(1)-(7). For spring water flows under Provision E.2.a.(3), only non-storm spring water discharges not identified under a separate NPDES permit and not identified as a source of pollutants do not have to be addressed as illicit discharges. 2013 MS4 Permit, F-89. Under Provision E.2.a.(6), if the Copermittee or the San Diego Water Board identifies any category of non-storm water discharges such as spring water as a source of pollutants to receiving waters, the category must be prohibited through ordinance, order, or similar means and addressed as an illicit discharge. Alternatively under Provision E.2.a.(6), the City of Poway may propose controls to be implemented for the category of non-storm water discharges as part of an updated WQIP instead of prohibiting the category of non-storm water discharges, and implement the controls if accepted by the San Diego Water Board as part of an updated WQIP.¹⁷ Id. In addition to the conditions of Provision E.2.a.(6), “Provision E.2.a.(7) has been included in the requirements for non-storm water discharges to clarify that any non-storm water discharges to the Copermittee’s MS4, even those identified pursuant to Provision E.2.a.(1) through E.2.a.(4) [i.e. spring water], must be reduced or eliminated, unless a non-storm water discharge is identified as a discharge authorized by a separate NPDES permit.” 2013 MS4 Permit, F-96. The mandate of Provision E.2.a.(7) for the reduction or elimination of spring water discharges into the MS4 is expected to be completed “where feasible and priorities and resources allow” unless the City obtains a separate NPDES permit for the discharges.¹⁸

Furthermore, Provision E.2.d describes the measures that the City must take to investigate and eliminate illicit discharges to the MS4. Provision E.2.d.(1) requires the City to “prioritize and determine when follow-up investigations will be performed in response to visual observations . . . of a detected non-storm water or illicit discharge to or from the MS4 . . . causing or contributing, or threatening to cause or contribute to impairments in water bodies . . . in environmentally sensitive areas (ESAs).” 2013 MS4 Permit, Provisions E.2.d.(1) and E.2.d.(1)(b). The City is also required to do the same for “[p]ollutants identified as causing or contributing to an exceedance of a NAL.” Provision E.2.d.(1)(d), id. at 90. Under Provision E.2.d.(2), the City is also required to

¹⁶ The NALs of Provision C.1 are incorporated into the City of Poway’s JRMP.

¹⁷ Rehabilitating streams and repairing wetlands are the types of “controls” contemplated by the 2013 MS4 Permit to reduce flows to the MS4 and retain pollutants in those flows.

¹⁸ Again, rehabilitating streams and repairing (re-establishing) wetlands are the types of controls contemplated by the 2013 MS4 Permit to “reduce” flows and retain pollutants in those flows before they reach the City’s MS4.

respond to a citizen's reports of non-storm water flows within Warren Canyon and the resulting polluted non-storm water discharges into Lake Poway with its own investigation and must maintain records of the discharges and their sources. Id. Under Provision E.2.d.(3), those spring water discharges that are in exceedance of NALs must either be addressed through its Enforcement Response Plan or the category must be addressed according to Provision E.2.a.(6). Id. at 91-92. Under Provision E.2.c., the City of Poway must conduct field screening of portions of its MS4 containing non-storm water in accordance with the dry weather monitoring requirements of Provision D. Id. at 89. Finally, under Provision E.2.d.(4), each Copermittee must submit a summary of all detected non-storm water discharges with each WQIP annual report required by Provision F. Id. at 92.

The pollutants present in the spring water from Kelly Spring and from Rock Haven Spring, including the assimilated sediment pollutants from unpermitted culvert crossings and unpermitted wetlands damage in Warren Canyon from tractors (anthropogenically influenced sources), have been added to Lake Poway through a point source (including through Fisherman's Footbridge located at 33.0039 Latitude, -117.007 Longitude) and have aggravated a condition of eutrophication pollution and waste blockage pollution in the reservoir. And even if no one from the City has never explicitly identified the spring water as a source of pollutants through its MS4 in Warren Canyon, the 2013 MS4 Permit still requires the City to reduce or eliminate non-storm water discharges such as water from springs to the MS4, where feasible and when priorities and resources allow,¹⁹ unless the City obtains a separate NPDES permit for the non-storm water discharges. 2013 MS4 Permit, Provision E.2.a.(7). In other words, there is no requirement in Provision E.2.a.(7) of the 2013 MS4 Permit that the City or the San Diego Water Board specifically identify the spring water as "a source of pollutants to receiving waters;" if a citizen can prove that the City has failed to implement the various requirements of Provision E.2.d of its 2013 MS4 Permit that would have uncovered the pollutants in the spring water or has failed to respond to valid reports of non-storm water containing pollutants through its MS4, he can in turn seek the enforcement of Provision E.2.a.(7) through a citizen enforcement action.²⁰ The spring water with assimilated pollutants can feasibly be reduced before it enters the City's MS4 through wetland repair projects in Warren Canyon; the City of Poway has the resources to put the plans into place; and the non-storm water discharges into Lake Poway must be addressed as a "priority" as that term is defined in the 2013 MS4 Permit, including Provisions E.2.d. Even though the City of Poway has not yet included the discharges from Warren Canyon into Lake Poway as an area of priority concern in its current WQIP, Poway would have identified the persistent dry weather flows in Warren Canyon – the non-storm spring water discharges – as a "source of pollutants to receiving waters" had it been adhering to the requirements of Provision E.2.d and other sections of the MS4 Permit. As Poway has not used the alternative compliance pathway as outlined in Provision B.3.c with respect to its non-stormwater discharges of polluted sediment and spring water flows containing pollutants aggravating a condition of pollution in receiving waters in the SDR watershed, Poway must implement Provision E.2 and properly address the discharges from Kelly Spring and Rock Haven Spring into its MS4. See Alaska Community Action on Toxics v. Aurora

¹⁹ The Ninth Circuit has held that the terms of an NPDES permit, where ambiguous on its face, raises issues of fact. Northwest Environmental Advocates v. City of Portland, 56 F.3d 979, 982 (9th Cir. 1995).

²⁰ See, e.g., Brown v. Superior Court, 37 Cal.3d 477, 484 (1984) ("A construction rendering statutory language surplusage 'is to be avoided.'"); People v. Sylvester, 58 Cal. App. 4th 1493, 1496 (1997) ("[E]ach word and phrase in the statute should be interpreted to 'give meaning to every word and phrase in the statute.'").

Energy Services LLC, 765 F.3d 1169 (9th Cir. 2014) (NPDES permit did not shield defendants from liability for non-stormwater discharges of coal into bay). Furthermore, Provision B.5 also requires the City to address the reports in this letter and attached exhibits with updated water quality improvement plans and strategies specific to the Warren Canyon subwatershed.

Certified hydrogeologist John Peterson (California Certified Hydrogeologist #90), who was employed by the County of San Diego for over 20 years as its groundwater expert and CEQA regulatory manager, has conducted water quantity and water quality monitoring of Kelly Spring and Rock Haven Spring using EPA protocols to establish that Warren Creek is a seasonal, intermittent stream fed by persistent groundwater flows and to identify any pollutants from these water sources that are transported to receiving waters of the United States. He has conducted 24-hour dry weather monitoring of the spring water flows on April 13-14, 2019 to capture the varying flow rates from the springs and to obtain flow-weighted composite samples for water quality monitoring pursuant to the strictures of Provision D.2 of the MS4 Permit. (See Exhibit 4.) The results have demonstrated that the water from Kelly Spring (N-Kelly) contains iron and phosphorous pollutants that exceed the NALs established in the City of Poway's JRMP, the 2013 MS4 Permit, and the San Diego Basin Plan. (See Exhibit 4.) The results also demonstrated that the water from Rock Haven Spring (S-Rock) contains total nitrogen and total phosphorous pollutants that exceed the NALs established by the City of Poway's JRMP, 2013 MS4 Permit, and the San Diego Basin Plan. (See Exhibit 4.) 24-hour water quality monitoring was also conducted in the receiving waters of the United States at Warren Crossing (the City of Poway's MS4) in the damaged wetland waters that are directly adjacent to Lake Poway on April 14-15, 2019 according to the strictures of Provision D.1. (See Exhibit 5.) The analysis of the flow-weighted composite sample at Warren Crossing has showed that the pollutants from Rock Haven Spring and from Kelly Spring reach the receiving waters of the United States as exceedances of phosphorous NALs are exhibited there as well. The overall ratio of total nitrogen to total phosphorous (TN : TP) in the discharges is much lower than permitted, allowing harmful cyanobacteria to flourish and a condition of eutrophication to persist in Lake Poway, including in the spring of 2019. Water quality monitoring conducted on March 18, 2019, March 21, 2019, March 28, 2019, April 2, 2019, April 10, 2019, and May 4-5, 2019 (dry weather monitoring during the dry season) also confirm that phosphorous levels exceeding NALs from Kelly Spring flow through Warren Crossing and Fisherman's Footbridge and enter Lake Poway on a persistent basis during the winter and spring months when stream waters flow through Warren Canyon during typical non-drought years. (See Exhibit 6.)²¹ To remedy the situation and to improve the water quality of downstream waters including at Warren Crossing and at Lake Poway, surface water expert Tory Walker, P.E. has proposed the wetlands repair projects that are described in Exhibit 7 to address the spring water flows through Warren Canyon by reducing those flows and retaining more of the phosphorous in those flows within engineered wetlands before they enter the City's MS4 at Warren Crossing and into Lake Poway. (See Exhibits 7 and 8.)

²¹ Furthermore, the results from the toxicity tests confirm that the nutrient-rich spring waters contribute to the overabundance of algae as compared to the controls in the studies (both the controls and the samples were supplied with nutrients during the experiments; the additional nutrients present in the spring water samples resulted in the samples performing better than the controls). (See Exhibits 5 and 6 for tests completed by Enthalpy Analytical.)

IV. CITIZEN CAN ENFORCE REPORTING AND MONITORING TERMS.

The City has failed to monitor receiving waters in Warren Canyon as required by Provision D.1.; has failed to identify and map out the public and private outfalls and other portions of the MS4 above Lake Poway as required under Provision D.2.a.(1);²² has failed to monitor the non-storm water discharges into Lake Poway as required by Provisions D.2.a.(2) and D.2.b.; and has failed to fulfill the illicit discharge detection, elimination, and reporting requirements of Provision E.2 and Provision F with regard to the washed out stream crossings as described above and the non-storm water that is a source of pollutants as described above. The City has failed to identify all portions of its MS4 including the cross-draining culverts along unpaved roads,²³ culverts located in WOTUS,²⁴ and the Fisherman's Footbridge located in the mouth of Warren Creek at Lake Poway. Should the City refuse to update its JRMP and Water Quality Improvement Plan accordingly, the CWA allows citizen suits based on violations of any conditions of an NPDES permit, even those which are purely procedural including reporting, monitoring and record-keeping. Ecological Rights Foundation v. Pacific Lumber Co., 230 F.3d 1141, 1151 (9th Cir. 2000); see Menzel v. County Utilities Corp., 712 F.2d 91, 94 (4th Cir.1983) (person who fails to file accurate discharge-monitoring reports violates terms of NPDES permit and is subject to citizen suit provision of the Clean Water Act).

V. THE CITY HAS FAILED TO OBTAIN THE PROPER CWA PERMITS AND WATER QUALITY CERTIFICATIONS FOR THE BOAT DOCK REPLACEMENT PROJECT COMPLETED IN 2017 AT LAKE POWAY.

In addition to the City of Poway's failure to obtain the proper CWA permits as described in the 60-day notice letter mailed to the City on November 5, 2018, the City has also failed to obtain the proper CWA permits and failed to adhere to various requirements of its 2013 MS4 Permit when it undertook a development project constructed in the waters of Lake Poway: the 2017 boat dock replacement project commenced in the winter of 2017 and finished in the fall of 2017. The City of Poway failed to adhere to various requirements of its 2013 MS4 Permit and failed to obtain valid authorizations from the Department of the Army (DA) and the San Diego Water Board when it undertook a development project constructed by Bellingham Marine Industries, Inc. within Lake Poway. (See Exhibit 9.) The City failed to obtain a valid CWA § 404 permit as well as a valid water quality certification under CWA § 401 for the boat dock because the City has incorrectly labeled Warren Creek, which drains directly into Lake Poway, as an ephemeral tributary, when in fact it is an intermittent stream, thus making Lake Poway "Waters of the United States" under longstanding EPA policy. The City, in violation of Provision E.3.a.(3) n.25 of the 2013 MS4 Permit and CWA §§ 401²⁵ and 404,²⁶ has failed to obtain any authorization whatsoever for the boat dock and associated anchorage installed within jurisdictional waters. Poway is in violation of the Clean Water Act for failing to obtain the proper permits, including the appropriate amount of

²² Private and public outfalls in Warren Canyon can be found at the following locations: 32.998, -116.9768; 32.998, -116.978; 32.9987, -116.9806; 33.0012, -117.0029; and 33.0030, -117.0057.

²³ Cross-draining culverts can be found along the hiking trails above Lake Poway including at the following locations: 33.003, -117.008; 33.004, -117.009; and 33.0047, -117.0110.

²⁴ MS4 culverts placed in WOTUS include the following locations: 33.0030, -117.0057 and 33.0062, -117.0052.

²⁵ 33 U.S.C. § 1341.

²⁶ 33 U.S.C. § 1344.

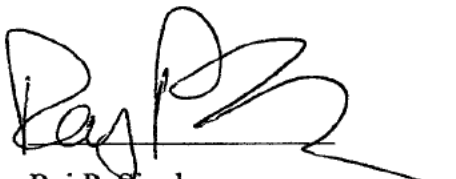
compensatory mitigation, for its boat dock and all other structures that were built/replaced in the Lake Poway area in 2017.²⁷ (Cf. Exhibit 10.) The City of Poway may be liable for statutory penalties each and every day from the first date of construction in the winter of 2017 up through the present day because the boat dock is unpermitted and illegal under CWA law.

VI. CONCLUSIONS


Absent a consent decree approved by the Court and the EPA, Notifiers intend, at the close of the sixty (60) day notice period, to amend [REDACTED] lawsuit or file another citizen lawsuit under Section 505 of the Clean Water Act against the City of Poway, seeking injunctive relief, remedial relief, declaratory relief, and civil penalties for each day of each violation for each U.S. water body over the past five (5) years and sixty (60) days from the date of this notice relating to the illegal discharges through the date of this letter and all violations of Section 301 of the Clean Water Act and violations of the City's 2013 MS4 Permit which occur subsequent to the date of this letter, plus costs, attorney and expert witness fees, and such other relief as may be appropriate. Notifiers will also seek removal of the pollutants from waterways as such discharges constitute illegal fill material in violation of Sections 301 and 404 of the Clean Water Act and the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, et seq. Notifiers intend, at the close of the sixty (60) day notice period, to file a citizen suit under §505 of the Clean Water Act, 33 U.S.C. §1365, against the City of Poway for the applicable statutory maximum for each violation, presently \$54,833 per day for each violation. 33 U.S.C. §1319(d) and 40 C.F.R. §19 and §19.4 Table 1 (or as otherwise provided by federal regulations). Civil penalties are mandatory once violations are found by a federal judge or jury. 33 U.S.C. §1319(c); Leslie Salt Co. v. United States, 55 F.3d 1388, 1396 (9th Cir. 1995) (civil penalties under Clean Water Act are mandatory, not discretionary).

During the sixty (60) day notice period, we will be available to set up a meeting with our team of scientific experts and discuss effective remedies and actions which will assure the Discharger's future compliance with the Clean Water Act and all applicable state water pollution control laws. In addition, we welcome discussion about whatever facts you believe are relevant which are not itemized in this notice letter. If you wish to avail yourself of this opportunity, please contact the undersigned.

Respectfully submitted on May 24, 2019,



Raj P. Singh



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²⁷ Poway never has obtained any CWA permits for its boat dock in the past 50 years.

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